92-344

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals properly ordered the district court to enter a preliminary injunction barring implementation of Executive Order No. 12,807, which was issued by the President on May 24, 1992, to authorize repatriation directly to Haiti of Haitian migrants interdicted by the United States Coast Guard on the high seas.

PARTIES TO THE PROCEEDINGS

The petitioners are Lawrence Eagleburger, the Acting Secretary of State (substituted as a party pursuant to Rule 35.3); William P. Barr, the Attorney General; Gene McNary, the Commissioner of the Immigration and Naturalization Service; Rear Admiral Robert Kramek and Admiral J. William Kime, United States Coast Guard; and the Commander of the United States Naval Base at Guantanamo Bay, Cuba.

The respondents are the Haitian Centers Council, Inc.; the National Coalition for Haitian Refugees, Inc.; the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut; and the following individual Haitian nationals: Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre and Mathieu Noel. The individual respondents brought this action on behalf of others similarly situated with respect to the high-seas interdiction program, including subclasses consisting of certain Haitian migrants who had been "screened in" or "screened out" or were awaiting screening under that program; relatives of such individuals; and Haitian migrants who had retained one of the respondent organizations to represent them. Compl. ¶¶ 36-41 (92-6090 C.A. App. 25-26).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of the Immigration and Naturalization Service, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion under review here (App. 1a-72a)[1] and its prior opinion (App. 73a-124a) are not yet reported. The district court's opinions (App. 125a-141a, 142a-163a, 164a-168a, 169a-170a) are not reported. The Eleventh Circuit's opinions in *Haitian Refugee Center* v. *Baker* (App. 171a-190a, 191a-252a) are reported at 949 F.2d 1109 and 953 F.2d 1498, respectively.

[1] "App." refers to the separately bound appendix to this petition for a writ of certiorari. "Stay App." refers to the appendix to the emergency application for a stay pending certiorari that we filed in this Court on July 30, 1992.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATY, STATUTES AND EXECUTIVE ORDERS INVOLVED

Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; 5 U.S.C. 701(a); Section 243 of the Immigration and Nationality Act, 8 U.S.C. 1253; and Executive Orders Nos. 12,807 and 12,324 are reproduced at App. 253a-265a.

STATEMENT

The sharply divided court of appeals in this case entered an extraordinary order barring implementation of Executive Order 12,807, which the President issued on May 24, 1992, to address the rapidly escalating crisis resulting from the massive outflow of migrants from Haiti in small, unseaworthy boats. The Executive Order authorizes the Coast Guard to repatriate directly to Haiti all migrants interdicted and rescued while headed toward the United States on the high seas. Once in Haiti, the interdictees—like any other Haitians claiming to be refugees—may apply at the United States Embassy in Port-au-Prince for admission to the United States under Section 207 of the Immigration and Nationality Act (INA), 8 U.S.C. 1157. The court of appeals, however, has attempted to reverse that policy. It did so based on an erroneous interpretation of a provision of the INA (8 U.S.C. 1253(h)) that—properly construed—has no application to aliens outside the United States. In the process, the court brushed aside the collateral estoppel effect of the Eleventh Circuit's decision rejecting the same claim on behalf of a class that includes the Haitian plaintiffs here; second-guessed the President's determination of the most appropriate manner in which to address the migrant

problem within the context of the broader crisis affecting Haiti; enjoined the operation of U.S. vessels on the high seas under the President's command; and intruded into a delicate area of the Nation's foreign policy. Its decision should not be permitted to stand.

1. This case arises out of the President's exercise of his constitutional and statutory authority to establish a program for interdicting would-be illegal migrants on the high seas. See 8 U.S.C. 1182(f), 1185(a); 14 U.S.C. 89. The program was instituted in 1981, based on a determination by the President that uncontrolled illegal immigration by sea is a "serious national problem." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). The President, in Executive Order No. 12,324, directed the Coast Guard to intercept vessels suspected of transporting illegal migrants and to return all passengers to their country of origin, subject to a proviso that any "person who is a refugee" would not be repatriated without his consent. § 2(c)(3), 46 Fed. Reg. 48,109 (1981). Contemporaneously, the United States entered into a bilateral agreement with Haiti that permitted U.S. officials to interdict and board Haitian flag vessels suspected of carrying illegal migrants. Agreement Effected by Exchange of Notes, U.S.-Republic of Haiti, Sept. 23, 1981, 33 U.S.T. 3559, T.I.A.S. No. 10,241.

To implement Executive Order No. 12,324, the Immigration and Naturalization Service (INS) conducted informal, non-adversarial "screening" interviews of interdictees on board Coast Guard cutters. Any interdictees who made a credible showing of political refugee status were tentatively "screened in" and brought to the United States, where they could file a formal application for political asylum under 8 U.S.C. 1158. Interdictees unable to make such a showing were "screened out" and returned immediately to Haiti. App. 75a-76a, 193a-197a.

The interdiction program has been an effective tool in the enforcement of our immigration laws. Between 1981

and 1991, more than 25,000 would-be illegal migrants were interdicted. Since October 1991, an additional 35,000 individuals have been interdicted. Leahy Decl. ¶¶ 3, 4 and attachments (Stay App. 338-339, 342, 345, 346). The interdiction program has also saved countless lives, as many of the boats could not have completed the long voyage to the United States.

2. a. The present crisis began with a military coup in Haiti on September 30, 1991, in which the democratically elected government of President Jean-Bertrand Aristide was overthrown. Although the United States temporarily halted repatriation of interdicted Haitians following the coup, it resumed repatriations on November 18, 1991, when the immediate post-coup violence subsided. App. 76a, 144a, 197a.

b. On November 19, 1991, Haitian Refugee Center, Inc. (HRC), and others filed an action (*HRC* v. *Baker*) in the United States District Court for the Southern District of Florida. They contended, *inter alia*, that the repatriations violated 8 U.S.C. 1253(h), which provides that the Attorney General shall not deport or return an alien to a country if the Attorney General determines that the alien's life or freedom would be threatened on account of political opinion. On the day the complaint was filed, the district court entered a temporary restraining order barring repatriation of any interdictees. Stay App. 114-116. Because interdictions were continuing at a high rate and Coast Guard vessels were seriously overcrowded, U.S. officials decided to house interdictees temporarily at the U.S. Naval Base at Guantanamo Bay, Cuba. Cummings Decl. ¶ 11 (Stay App. 122-123).

The district court in *HRC* subsequently certified a plaintiff class consisting of (App. 7a):

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval Base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

On December 3, 1991, the court then entered a preliminary injunction that continued the prohibition against repatriations. The court relied on what it found to be a First Amendment right of plaintiff HRC to have access to the interdictees, and on Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, which provides that a Contracting State shall not "expel or return ('refouler')" a refugee to a country where his life or freedom would be threatened on account of political opinion.[2] Stay App. 168-230. At the same time, the court rejected the claim by the class of present and future interdictees under 8 U.S.C. 1253(h), explaining that "the statutory rights and protections asserted are reserved, by the very terms of the statute[], to aliens within the United States." Stay App. 219-220. The Eleventh Circuit reversed the preliminary injunction, App. 171a-189a (*HRC I*), but the district court immediately entered several further injunctions on other grounds. See App. 199a-202a.

In late January 1992, the government sought emergency relief from the Eleventh Circuit, supported by evidence that the bar to repatriations was exacerbating the situation by providing an incentive for Haitians to take to the seas. When the Eleventh Circuit failed to act promptly on that request, the government filed an application for a stay in this Court, citing the same exigencies. This Court granted a stay the next day, pending the Eleventh Circuit's decision on the government's appeals, and thus permitted repatriations to resume. 112 S. Ct. 1072 (Jan. 31, 1992). A few days later, the Eleventh Circuit rendered its decision, reversing the remaining injunctions and ordering dismissal of the action. App. 190a-

[2] The United States acceded to Article 33.1 of the Convention by ratifying the United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223.

252a (*HRC II*). The court expressly rejected the Haitian plaintiffs' claim under 8 U.S.C. 1253(h), explaining that Section 1253(h) "is found in Part V of the INA" and that "[t]he [relevant] provisions of Part V * * * only apply to aliens 'in the United States.'" App. 215a (quoting 8 U.S.C. 1251, 1253(a)). This Court denied the *HRC* plaintiffs' application for a stay and petition for a writ of certiorari on February 24, 1992. 112 S. Ct. 1245.

3. Just a little more than three weeks later, respondents filed this suit in the United States District Court for the Eastern District of New York, raising essentially the same challenges to the interdiction program that had been rejected in *HRC*. On April 6, the district court, relying on the First Amendment and the Due Process Clause, entered a preliminary injunction that (i) required petitioners to grant the respondent organizations "access" to the individual interdictees housed at Guantanamo, and (ii) enjoined petitioners from reinterviewing or repatriating interdictees who previously had been "screened in," without first allowing them to communicate with counsel. App. 142-163a; see also *id.* at 125a-141a (prior temporary restraining order.)[3] The court certified a class of "Screened in Plaintiffs" entitled to that relief. *Id.* at 161a-162a. After unsuccessfully seeking a stay in the court of appeals, the government sought

[3] The government had continued the practice of paroling into the United States under 8 U.S.C. 1182(d)(5) most Haitian migrants who made a sufficient threshold showing to be screened in, although there was some delay in doing so because of the need to find sponsors for them in the United States. The INS decided, however, to reinterview at Guantanamo those screened-in migrants who had tested positive for the HIV virus. Such aliens are excluded from admission unless the Attorney General grants a waiver. See 8 U.S.C. 1157(c)(3), 1182(a)(2)(A)(i). The thought was that persons statutorily ineligible for entry should not be brought to the United States in the absence of a determination that they are genuine refugees. App. 82a-83a, 147a; Cummings Decl. ¶¶ 21-24 (Stay App. 127).

relief in this Court, which granted a stay on April 22, 1992. 112 S. Ct. 1714.

On June 10, 1992, the court of appeals vacated those portions of the preliminary injunction that required the government to grant the respondent organizations access to Guantanamo, but affirmed the prohibition against further processing or repatriation of "screened in" interdictees without affording them an opportunity to communicate with counsel. App. 73a-118a. Because the court of appeals' decision directly affected only the several hundred screened-in Haitians remaining at Guantanamo who had communicable diseases (see note 3, *supra*) and did not require the government immediately to grant access to counsel, the government did not seek extraordinary relief in this Court.[4]

4. In May 1992, while the appeal of the preliminary injunction was still pending before the Second Circuit, the number of individuals leaving Haiti by boat surged dramatically; nearly 10,500 Haitians were intercepted by the Coast Guard in the first 20 days of the month, exceeding the total for the prior three months combined. By May 20, the temporary tent camp at Guantanamo was nearing capacity. Leahy Decl. ¶¶ 5-6 (Stay App. 339-340); Allen Decl. ¶¶ 2-3 (Stay App. 348-349). For that reason, and to avoid dangerous overloading of its cutters, the Coast Guard issued orders to interdict only boats in imminent danger of foundering. But the migration continued, in vessels unseaworthy, overloaded, and unfit for the intended voyage. About that time, a Haitian vessel capsized off the Cuban coast, resulting in the death of approximately half the forty migrants aboard. Leahy Decl. ¶¶ 6-7 (Stay App. 339-340). In addition, the State Department believed that a massive outmigration would make the United States "vulnerable to pressure tactics from the de facto authorities in Haiti * * * to abandon

[4] The government's petition for rehearing and suggestion of rehearing en banc were denied on July 24, 1992.

the embargo and other measures designed to speed the return of democracy." Kanter Decl. ¶ 4 (Stay App. 353).

At this juncture, the President had limited options. In light of the saturation of Guantanamo and the Coast Guard cutters, the unwillingness of third countries to accept any significant numbers of Haitian migrants, and the continuing massive outflow and attendant risk of loss of life, the only practicable alternatives were either to bring all Haitian migrants directly to the United States for screening or repatriate them all to Haiti immediately upon interdiction. Based on the judgment that the former course would precipitate a further outflow of a magnitude as yet unknown (with an even greater prospect of chaos and loss of life), the President decided to continue the interdiction program but to repatriate all interdictees directly to Haiti, and to provide for processing of applications for refugee admission to the United States at our Embassy in Port-au-Prince, pursuant to 8 U.S.C. 1157. Kanter Decl. ¶¶ 8, 10-11 (Stay App. 354-355). This decision was embodied in Executive Order No. 12,807, 57 Fed. Reg. 23,133 (1992), issued May 24, 1992, which replaced Executive Order No. 12,324.[5] At the same time, the President took steps to assure adequate staff at our Embassy in Haiti to process refugee applications,[6] or-

[5] Although the May 24 Executive Order does not require screening of migrants interdicted on the high seas, it provides that "the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." § 2(c)(3), 57 Fed. Reg. 23,134. Under Coast Guard instructions, an interdictee will not be repatriated immediately to Haiti if the commanding officer believes that repatriation would place the interdictee in immediate and exceptionally grave physical danger, based on either the officer's observation or compelling statements by the individual. In that situation, the commanding officer is to provide temporary refuge and seek direction from higher authority. Leahy Decl. ¶ 12 (Stay App. 341-342).

[6] The State Department has informed us that it currently has at least 10 U.S. officials and 25 Haitian employees engaged in receipt and processing of applications at the U.S. Embassy, and that it has received applications on behalf of more than 9000 persons since the initiation of in-country processing earlier this year.

dered an immediate increase in humanitarian aid for the people of Haiti, and called on the international community to furnish additional assistance. 28 Weekly Comp. Pres. Doc. 924 (May 24, 1992).

5. On May 27, 1992, respondents applied for a temporary restraining order to bar implementation of the President's May 24 Executive Order. Treating the application as a motion for a preliminary injunction, the district court denied relief. App. 164a-168a. It held, *inter alia*, that "Section [1253(h)] is * * * unavailable as a source of relief for Haitian aliens in international waters." App. 167a-168a.

6. Two months later, a divided panel of the court of appeals reversed and ordered entry of a preliminary injunction, albeit without addressing the government's argument that judicial review under the APA is precluded because the INA provides for review only at the behest of aliens within the United States. App. 1a-72a.

a. The majority first held that the Haitian plaintiffs' claim under 8 U.S.C. 1253(h) is not barred under collateral estoppel principles by the Eleventh Circuit's decision in *HRC II*, which squarely held that Section 1253(h) does not apply to aliens outside the United States. App. 7a-14a. The majority acknowledged that the *HRC* class included "all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters * * * who were interdicted on the high seas pursuant to the United States Interdiction Program." *Id.* at 7a. But it held that the Haitian plaintiffs here are different, on the theory that Haitians interdicted after May 24 would not be detained "pursuant to the United States Interdiction Program" that was before the Eleventh Circuit, but under a "different" program that provides for repatriation without screening.

Id. at 9a-11a. The majority further decided that it would not in any event give preclusive effect to the *HRC* judgment because, in its view, the May 24 Executive Order constituted "an intervening change in the applicable legal context" that justified relitigation, "few judicial resources would be saved by collaterally estopping these plaintiffs," and "[t]he federal judicial hierarchy deserves this opportunity to consider the weighty issues on the merits." *Id.* at 12a-14a.

Reaching the merits, the majority held that 8 U.S.C. 1253(h) applies to aliens outside the United States, App. 15a-35a, thereby creating what it termed "an explicit 'circuit split'" with the Eleventh Circuit's ruling in *HRC II*. App. 14a. The majority acknowledged the presumption against extraterritorial application of federal statutes, but found the presumption overcome here by the reference in Section 1253(h) to "any alien." App. 15a-18a. The majority also rejected the argument, adopted by the Eleventh Circuit in *HRC*, that the various provisions in Part V of the INA (in which Section 1253(h) is located) that refer to aliens "in the United States" establish that Section 1253(h) is necessarily so limited. App. 19a-21a. The government argued that its interpretation of Section 1253(h) is supported by Article 33.1 of the U.N. Convention, to which Section 1253(h) was meant to conform, since the President, in Executive Order 12,807, has formally construed Article 33.1 not to apply to aliens outside the territory of a Contracting State. The majority, however, rejected the President's construction of Article 33.1, labeling it a "litigating posture" (App. 30a, 31a), and held that Section 1253(h) creates a parallel right of non-repatriation that is independent of the rest of Part V of the INA. See App. 23a-35a.

b. Judge Walker dissented. App. 43a-72a. He would have found the Haitian plaintiffs' claim barred by collateral estoppel, *id.* at 43a-52a, because the extraterritorial application of Section 1253(h) was litigated and decided in *HRC*, and because the present class—"all Haitian citizens who have been or will be screened in"—is wholly included within the *HRC* class of Haitians "who are currently detained or will in the future be detained." App. 45a-46a. Judge Walker disagreed with the majority's view that the May 24 Executive Order instituted a new interdiction program, and that the Executive Order therefore was an "intervening change" justifying a refusal to apply collateral estoppel. *Id.* at 46a-48a. Rather, he explained, relitigation is permitted only where, unlike here, "the legal grounds upon which th[e] prior litigation was resolved" have changed. *Id.* at 49a-50a (emphasis omitted). On the merits, Judge Walker disagreed with the majority's analysis of 8 U.S.C. 1253(h). Finding the statutory language ambiguous, App. 52a-55a, he concluded that the purpose of the 1980 amendments and the U.N. Convention made it clear that Section 1253(h) does not apply outside the United States. App. 55a-68a.

7. Later in the day on July 29, 1992, the district court entered a preliminary injunction in accordance with the Second Circuit's decision, barring repatriation to Haiti of "any interdicted Haitian" whose life or freedom would be threatened on account of his or her political opinion. App. 169a-170a. On August 1, 1992, this Court granted petitioners' application for a stay pending the filing (by August 24, 1992) and disposition of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Executive Order No. 12,807 represents the President's considered response to a regional crisis involving a life-threatening situation on the high seas. This presidential determination is inextricably tied to the United States' overall immigration and foreign policy in the region. By enjoining the President's action, the court of appeals has intruded intolerably into matters assigned by the Constitution to the President—by interfering directly with the operation of military vessels under his command on the high seas, and by upsetting the delicate balance of

diplomatic and other measures instituted by the President to restore democratic rule in Haiti and resolve the broader crisis affecting that country.

The court of appeals' decision rests on four fundamental errors, each sufficient in itself to require reversal of the judgment below. *First*, judicial review is precluded because the INA expressly provides for judicial review of INA claims by aliens within the United States, but not those beyond our borders. *Second*, even if judicial review is not entirely foreclosed, respondents' claim under 8 U.S.C. 1253(h) is barred under the doctrine of collateral estoppel by the Eleventh Circuit's decision in *HRC* v. *Baker*. *Third*, the court of appeals' holding that 8 U.S.C. 1253(h) applies to aliens outside the United States cannot be squared with the presumption against extraterritorial application of Acts of Congress, the statutory text, its legislative history, and the parallel limitation of Article 33.1 of the U.N. Refugee Convention. *Fourth*, equitable principles foreclose an award of injunctive relief to aliens outside the United States that bars implementation of the President's directives in this sensitive area of military operations and foreign policy.

The effect of the decision below, if allowed to stand, can only be to encourage yet another massive outmigration from Haiti, which would revive the very crisis that the President ameliorated through the issuance of Executive Order No. 12,807. In light of these and other adverse effects on the Nation's foreign policy—as well as the direct conflict with the Eleventh Circuit's ruling regarding the territorial reach of 8 U.S.C. 1253(h)—review by this Court is plainly warranted. Indeed, after the Court granted our emergency application for a stay in light of the exigencies described above, respondents requested the court to grant certiorari and expedite consideration of the case on the merits.

A. The court of appeals did not even address petitioners' argument (Gov't C.A. Br. 59-62) that the Haitian plaintiffs in this case—aliens who are outside the

territory of the United States—have no basis for invoking the jurisdiction of U.S. courts to seek the extraordinary relief the courts below ordered. The only plausible basis for judicial review would be the cause of action established by the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* But as the Eleventh Circuit held in *HRC II*, App. 204a-209a, the INA impliedly "preclude[s] judicial review" under the APA: See 5 U.S.C. 701(a)(1).[7]

The INA prescribes detailed procedures for administrative and judicial review for aliens who claim to be refugees when they seek asylum or withholding of deportation, but only if they are "physically present in the United States or at a land border or port of entry" (8 U.S.C. 1158(a) (asylum)), "in the United States" (8 U.S.C. 1253(a) and (h) (withholding of deportation)), or "within the United States" (8 U.S.C. 1105a(a) (judicial review of orders of deportation and exclusion)). By contrast, 8 U.S.C. 1157, which confers discretionary authority on the President and the Attorney General with respect to aliens who seek refugee status while *outside* the United States, does not include any provision for judicial review. See *HRC II*, App. 205a-206a. Accordingly, Congress's intent to preclude judicial review for such aliens under the APA is " 'fairly discernible' in the detail of the legislative scheme." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984); cf. *Ardestani* v. *INS*, 112 S. Ct. 515, 518-519 (1991). Where, as here, "a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of

[7] For the reasons stated in Point B, *infra*, the Eleventh Circuit's holding that the INA precludes judicial review pursuant to the APA is binding upon the Haitian plaintiffs here under collateral estoppel principles. The Eleventh Circuit went on to hold in *HRC II* that the Haitian plaintiffs likewise have no independent cause of action under Section 1253(h). App. 214a-216a. However, the Eleventh Circuit did not hold (as it should have done) that there is no basis for a cause of action "independent" of the APA. Instead, it rejected the interdictees' claim on the merits.

particular persons, judicial review of those issues at the behest of other persons [is] impliedly precluded." 467 U.S. at 349; see also *United States* v. *Fausto*, 484 U.S. 439, 448-449 (1988). This result conforms to Congress's traditional unwillingness to permit judicial review of immigration decisions concerning aliens outside the United States who have "never presented [themselves] at the borders." See *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956).[8]

B. The decision below also flouts the preclusive effect of the Eleventh Circuit's judgment in *HRC II*. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). As the court of appeals acknowledged, App. 9a, this rule is fully applicable to the judgment in a class action. See *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874 (1984).

The Eleventh Circuit held in *HRC II* that 8 U.S.C. 1253(h) does not apply to aliens who are not "in the United States." App. 214a-216a. That decision bound a class of all Haitians who "are currently detained or who in the future will be detained * * * pursuant to the United States Interdiction Program and who are being denied * * * procedural rights." App. 7a. The Haitian plaintiffs here fall squarely within that definition: they have been or will be interdicted on the high seas, and as in *HRC*, they claim that they have not been or will

[8] This principle is reflected in the settled rule that visa decisions by U.S. consular officers are unreviewable. *Wan Shih Hsieh* v. *Kiley*, 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Te Kuei Liu* v. *INS*, 645 F.2d 279, 285 (5th Cir. 1981); *Pena* v. *Kissinger*, 409 F. Supp. 1182, 1185-1188 (S.D.N.Y. 1976). See also *HRC II*, App. 207a-209a.

not be suitably screened to determine whether they are refugees.[9]

The court of appeals advanced two reasons for refusing to accord preclusive effect to the *HRC* judgment. First, it concluded that the plaintiffs here are different from those in *HRC*. In the court's view, the "United States Interdiction Program" referred to in the *HRC* class definition is no longer in effect, because at that time Haitian migrants were screened following interdiction, but now they are not. See App. 9a-10a. As Judge Walker pointed out in dissent (*id.* at 46a-48a), this distinction is entirely artificial. The term "interdiction program" in the *HRC* class definition referred to the program under which Haitian migrants are stopped and prevented from coming directly to the United States. That program was established in 1981 pursuant to a Presidential proclamation and the agreement with Haiti, and the May 24 Executive Order did not terminate it. Although the May 24 Executive Order changed some of the post-interdiction procedures under the program, those changes do not undermine the identity of the parties who have challenged the government's procedures as inadequate under 8 U.S.C. 1253(h) both before *and* after that Order.

Second, the court of appeals held that relitigation was justified on the ground that the May 24 Executive Order constituted "an intervening change in the applicable legal context." App. 12a.[10] However, that exception applies

[9] See page ii, *supra*. The only class actually certified by the district court to date consists of the lesser-included class of Haitians who have not only been detained, but also screened in. App. 162a.

[10] The court of appeals did not suggest that the May 24 Executive Order constituted a change in the *facts* essential to the judgment in *HRC* that rendered collateral estoppel inapplicable. The Eleventh Circuit did not rest its holding on the existence of the procedures that were then in effect for screening interdictees; it found 8 U.S.C. 1253(h) altogether inapplicable to the class of present and future

only where there have been "modifications in 'controlling legal principles,' [which] * * * could render a previous determination inconsistent with prevailing doctrine." *Montana* v. *United States*, 440 U.S. 147, 161 (1979). There has been no such change in the controlling legal principles here: Congress has not amended 8 U.S.C. 1253(h), and this Court has not rendered any decision undermining the Eleventh Circuit's analysis. See 18 C. Wright *et al.*, *Federal Practice and Procedure* § 4425, at 259 (1981).[11]

The court of appeals also adverted to the exception to the application of collateral estoppel for successive cases involving "unmixed questions of law," App. 12a, although the court omitted any mention of the further requirement that the successive cases be ones involving "substantially unrelated claims." See *Montana*, 440 U.S. at 162-164; *United States* v. *Moser*, 266 U.S. 236, 242 (1924). The precise scope of this exception "may be difficult to delineate," but this case, like *Montana*, "poses no such conceptual difficulties," because respondents' legal "demands" under 8 U.S.C. 1253(h) "are closely aligned in time and subject matter" to those in *HRC*. 440 U.S. at 163; see also *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984).

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interdictees. See App. 84a-85a (Walker, J., dissenting); compare *Montana* v. *United States*, 440 U.S. 147, 159-160 (1979).

[11] The court of appeals also suggested that preclusion should be dispensed with in the interest of the "equitable administration of the laws," based on its view that the government had contravened representations it made in its brief in opposition to the certiorari petition in *HRC*. App. 13a-14a. However, as we explained in our July 30 application for a stay (at 21-22 & n.6), although the brief in opposition in *HRC* described the government's then-current policy, the entire thrust of the government's position was that the President must retain flexibility to respond to international developments free from judicial interference. In any event, the contents of that filing in no way undermine the finality or binding effect of the judgment in *HRC*. See App. 51a (Walker, J., dissenting).

Moreover, the refusal by the courts below to apply collateral estoppel completely frustrated the purposes of that doctrine: to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *McCurry*, 449 U.S. at 94. The court of appeals addressed only the second of these purposes, expressing the view that "judicial economy" is not undermined here because "few judicial resources would be saved by collaterally estopping these plaintiffs." App. 12a-13a. The court was wrong. The course of this litigation—which has replicated the *HRC* experience of a sequence of temporary restraining orders and preliminary injunctions, expedited briefing and hearings, and repeated stay applications to the court of appeals and this Court—has scarcely served the interests of judicial economy. In addition, the court of appeals entirely disregarded the substantial interests of the United States in avoiding relitigation of issues that were resolved in its favor in *HRC* after a full and fair hearing, and in avoiding reinstatement of intrusive injunctions of the kind that the Eleventh Circuit set aside in that case.

C. As to the merits, the court of appeals plainly erred in holding that 8 U.S.C. 1253(h) prohibits the Coast Guard from implementing the President's policy of repatriating interdicted Haitian migrants directly to Haiti.

Section 1253(h) must be construed in light of the "longstanding principle of American law" that an Act of Congress is presumed "to apply only within the territorial jurisdiction of the United States" unless there is a "clearly expressed." "affirmative intention" by Congress to the contrary. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949), and *Benz* v. *Compania Naviera Hildago, S.A.*, 353 U.S. 138, 147 (1957)); see also *Argentine Republic* v. *Amerada Hess*

Shipping Corp., 488 U.S. 428, 440 (1989) (applying presumption to the high seas). That is especially so where, as here, it is contended that an Act of Congress confers a right on *aliens* outside the United States that is enforceable in U.S. courts. *Arabian American Oil Co.*, 111 S. Ct. at 1234; *Foley Bros.*, 336 U.S. at 286. The requirement of a "clear statement" is imposed to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991). Moreover, in this setting, the presumption against extraterritoriality is reinforced by the principle that statutes should be construed so as not to interfere with foreign policy, *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963); *Benz*, 353 U.S. at 147, or the prerogatives of the President, *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2775-2776 (1992).

In this case, there is no affirmative indication—much less a "clear statement"— that Congress intended to apply Section 1253(h) outside the United States, and thereby to confer on aliens seeking illegal entry into the United States a right to avoid repatriation. Nor is there any indication that Congress "faced" the "critical matters" that would be involved in conferring such a right on aliens outside the United States that can be enforced in U.S. courts against the Executive Branch officials responsible for the operation of military vessels on the high seas pursuant to orders of the President.

1. Paragraph (1) of Section 1253(h) provides:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

The court of appeals believed that the reference to "any alien" made it "plain" and "unambiguous" that Section 1253(h) applies to aliens outside the United States, since "aliens are aliens, regardless of where they are located." App. 15a-16a, 21a, 23a. This Court has made clear, however, that such general language does *not* overcome the presumption against extraterritoriality. See *Foley Bros.*, 336 U.S. at 282 (statute requiring eight-hour day provision in "[e]very contract made to which the United States * * * is a party" inapplicable to contracts for work performed in a foreign country); *Arabian American Oil Co.*, 111 S. Ct. at 1231-1232 (broad definitions of "employer" and "commerce" insufficient to sustain extraterritorial application of Title VII).[12] The court below cited no other affirmative evidence in the text of Section 1253(h) that it applies to aliens outside the United States—or, in particular, that it prevents the *Coast Guard* from carrying out the President's orders to repatriate Haitians interdicted on the high seas.[13] All indications, in fact, are to the contrary.

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[12] See also *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992) (Stevens, J., concurring in the judgment) (Endangered Species Act's requirement that "[e]ach Federal agency" shall insure that "any action" it funds or carries out does not jeopardize "any" protected species "is not sufficient to overcome the presumption against the extraterritorial application of statutes").

[13] The court did point out that the word "return" means "to bring, send, or put (a person or thing) back to or in a former position." App. 22a (quoting *Webster's Third New International Dictionary* 1941 (1986)). But that definition is fully consistent with our position, under which the Attorney General may not "send" an alien from the United States "back" to Haiti if he would be threatened with persecution there. The court of appeals found it significant that although the word "return" in Section 1253(h) is followed by the phrase "to a country [where he would be threatened with persecution]," Congress "made no mention of where the alien (who may be anywhere, within or without the United States) must be returned 'from.'" App. 22a. Such inferences from congressional

In the first place, Section 1253(h) applies only to the actions of the Attorney General. That is not surprising, since it is located in the part of the INA concerned with procedures for deporting an alien from the United States —a subject under the Attorney General's responsibility. See page 21, *infra*. Neither Section 1253(h) nor Part V of the INA addresses the responsibilities of the Coast Guard or any other agency that might encounter a potential refugee outside the territory of the United States. Moreover, Section 1253(h) is triggered only "if the Attorney General determines" that the alien would be threatened with persecution. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). The Attorney General has made no such determination with respect to Haitian migrants who might be repatriated under the President's May 24 Executive Order. Instead, the President has decided that refugee determinations concerning Haitians who want to enter the United States will be made in Haiti, pursuant to 8 U.S.C. 1157.

Paragraph (2) of Section 1253(h), which carves out exceptions to the prohibition in paragraph (1), confirms that it applies only to aliens in the United States. Of particular relevance here, paragraph (2)(C) provides that the benefits of Section 1253(h) are not available to an "alien [who] has committed a serious nonpolitical crime outside the United States *prior to the arrival of the alien in the United States*" (emphasis added). Thus, this exception—the "only geographic reference" in the Section, *Defenders of Wildlife*, 112 S. Ct. at 2150 (Stevens, J., concurring in the judgment)—presupposes that the alien involved has arrived in the United States. Compare *Arabian American Oil Co.*, 111 S. Ct. at 1234 (similarly noting Title VII's mention of "states" but not foreign nations).

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silence, however, are insufficient to overcome the presumption. *Arabian American Oil Co.*, 111 S. Ct. at 1231-1232, 1233-1234. That is especially so since the phrase "to a country" modifies "deport" as well as "return," and "deport" indisputably refers to removal of an alien *from* the United States.

2. The interpretation of Section 1253(h) that is evident from its terms is also compelled by the statutory context in which it appears. Section 1253(h) is in Part V of the INA, 8 U.S.C. 1251-1260, which governs the standards and procedures for expelling aliens from the United States. Section 1251, entitled "Deportable aliens," identifies which aliens are subject to expulsion. It begins by stating that "[a]ny alien *in the United States* * * * shall, upon the order of the Attorney General, be deported" if he falls within any of a number of enumerated categories. 8 U.S.C. 1251(a)(1) (emphasis added). Section 1252, entitled "Apprehension and deportation of aliens," then provides for arrest and detention; deportation proceedings before a special inquiry officer; a final order of deportation; and removal of the alien "from the United States" by the Attorney General. 8 U.S.C. 1252(a)-(c).

Section 1253, in turn, is entitled "Countries to which aliens shall be deported." Its inapplicability to aliens outside the United States is established by subsection (a), which states that "[t]he deportation of an alien *in the United States* * * * shall be directed by the Attorney General," either to a country designated by the alien that is willing to accept him, or to another country. 8 U.S.C. 1253(a) (emphasis added); see *INS* v. *Doherty*, 112 S. Ct. 719, 722-723 (1992). Subsection (h) of 8 U.S.C. 1253, at issue here, simply places a limitation on the countries (specified in subsection (a)) to which the Attorney General may send an alien who is unlawfully "in the United States." Thus, the text and structure of Part V of the INA refute the notion that Section 1253(h) confers a freestanding right upon aliens anywhere in the world. See *McCarthy* v. *Bronson*, 111 S. Ct. 1737, 1740 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988).

3. The limited territorial scope of Section 1253(h) is also supported by the parallel scope of Article 33 of the

U.N. Convention. As this Court has noted, Section 1253(h) was revised by the Refugee Act of 1980 (Pub. L. No. 96-212, § 203(e), 94 Stat. 107) to conform its language to Article 33. See *INS* v. *Stevic*, 467 U.S. 407, 421 (1984). It therefore is significant that the legislative history of the 1980 Act shows that Congress understood the Convention to "insure the fair and humane treatment for refugees *within the territory of the contracting states*." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added). The President, in accordance with the considered opinions of the Attorney General and the Secretary of State (see App. 30a-31a), set forth the same interpretation in Section 2 of his May 24 Executive Order, which states that the terms of Article 33 "do not extend to persons located outside the territory of the United States." This interpretation by the Executive is entitled to "great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). Moreover, contrary to the court of appeals' view, that interpretation is supported by the text of Article 33 and the Convention as a whole, the negotiating history, and the United States' accession to and construction of the Convention.

a. Article 33 contains no express statement or other affirmative indication that it was intended to impose obligations on a Contracting State outside its own territory. Paragraph 1 of Article 33 provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on account of his political opinion. Art. 33.1, 19 U.S.T. at 6276. The most natural reading of this language is that it expresses an essentially unitary prohibition against removal of a refugee *from* the "Contracting State" *to* a foreign territory in the specified circumstances, irrespective of the manner in which the removal might be accomplished. The prohibition against "expelling" plainly has in mind a refugee who is within the territory of the

Contracting State. The succeeding phrase rounds out (and prevents circumvention of) that prohibition by providing that a refugee is likewise not to be sent ("return[ed]") from the Contracting State to the foreign territory in any *other* "manner."

This conclusion is reinforced by the word "refouler," which immediately follows (and thus gives content to) "return" in paragraph 1. Significantly, one meaning of the French word "refouler" is to "expel (aliens)." *Cassell's French Dictionary* 627 (1978). Under this meaning, "return," like "expel," connotes ejection of an alien from within the territory of the Contracting State. The court of appeals rejected this interpretation because it believed that it would render the term "return ('refouler')" redundant by effectively revising Article 33.1 to forbid a Contracting State to "expel or expel" an alien. App. 29a. The court missed the point. Insertion of the French word "refouler" after "return" in the English text demonstrates that the latter is used as a term of art. Although its meaning is similar to "expel," the two terms are not identical. To the contrary, as the negotiating history of the Convenion shows (see pages 24-25, *infra*)—and as the court of appeals elsewhere acknowledged (App. 29a)—"expel" is also a term of art in this setting, referring to the formal process for removing an alien who was admitted to the country. Accordingly, "expel" and "return ('refouler')" describe two different ways or situations in which an alien might be physically removed from the Contracting State's territory.[14]

This interpretation is also reflected in paragraph 2 of Article 33, which states that the benefit of nonrefoule-

[14] The court of appeals also cited respondents' reliance on other meanings of the French word "refouler," such as "drive back" or "repulse." App. 28a; see Resp. C.A. Br. 17 (citing M. Dubois, *Dictionnaire Larousse* 631 (1981)). At the very least, however, the existence of several French definitions is fatal to the court of appeals' conclusion that the "plain language" of Article 33.1 compels the interpretation it adopted. See App. 26a, 29a.

ment may not be claimed by a refugee who is a danger to the security of "the country in which he is." Thus, the only express territorial reference in Article 33 contemplates that the refugee must be "in" the "country" concerned.

The Convention as a whole lends still further support to this reading. As the court of appeals recognized, App. 26a-28a, the principle of territorial limitation is woven into numerous Articles of the Convention. See Arts. 4, 15, 17.1, 18, 19, 21, 23, 24, 26 and 28. Furthermore Article 40, entitled "Territorial Application Clause," addresses that issue across the board. 19 U.S.T. 6279. Paragraph 1 of Article 40 provides that a State may "declare that this Convention shall *extend* to all or any of the territories for the international relations of which it is responsible." *Ibid.* (emphasis added). Accordingly, Article 40—which the majority below did not even mention—establishes that a Contracting State's obligations under Article 33 do *not* automatically extend beyond its sovereign territory, even to other territories it administers—much less to the high seas and elsewhere throughout the world.[15]

b. Any lingering doubt on the extraterritoriality issue is dispelled by the official minutes of the Conference of Plenipotentiaries that adopted the language of Article 33. The Swiss delegate expressed the view at one session that "expulsion" "related to a refugee already admitted into a country," while "return (*'refoulement'*)" related to a "refugee already within the territory but not yet [a] resident." U.N. Doc. A/CONF. 2/SR.35 at 21 (1951); U.N. Doc. A/CONF. 2/SR.16 at 6 (1951). The representatives of France, Belgium, Germany, Italy, the Netherlands, and Sweden agreed. At a subsequent session, the representative of the Netherlands stated that, based on his intervening conversations with other representatives, there appeared to be a "general consensus" in

[15] This principle of territorial limitation is carried forward in the 1967 Protocol. See Art. 7.4, 19 U.S.T. at 6228.

favor of the Swiss interpretation. He then asked to have the record show that the Conference was in agreement with this interpretation, "[i]n order to dispel any possible ambiguity" and to ensure that "mass migrations across frontiers or of attempted mass migrations"—the precise context of this case—are "not covered by article 33." U.N. DOC. A/CONF. 2/SR.35 at 21. "There being no objection," the President of the Conference ordered that interpretation "placed on the record." *Ibid.* He further suggested that "refouler" be placed in brackets after "return" every place the latter word appears in the English text, and that suggestion was "adopted unanimously." *Id.* at 21-22. On this record, the word "refouler" can only be understood to embody a deliberate decision by the Contracting States to incorporate the territorial limitation we urge into the text of Article 33.1. App. 63a-66a (Walker, J., dissenting); *HRC* v. *Gracey*, 809 F.2d 794, 840 & nn. 132, 133 (D.C. Cir. 1987) (Edwards, J., concurring and dissenting).

c. The inapplicability of Article 33 to the repatriations challenged here is confirmed by the circumstances of the United States' ratification of the 1967 Protocol. The United States acceded to Article 33 through the Protocol on the understanding that our immigration laws already provided the protections that Article 33 required, and that Article 33 therefore could be implemented through Section 1253 as it then existed. *Stevic*, 467 U.S. at 417-418. Significantly, at the time, this Court had long since held, in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958), that Section 1253(h) did not even apply to aliens who were physically present in the United States but subject to exclusion proceedings. *Stevic*, 467 U.S. at 415. *A fortiori*, Haitian migrants affected by the President's May 24 Executive Order, who are altogether outside the United States, enjoy no rights under Article 33.

This understanding represents the State Department's longstanding position, both before and after passage of the Refugee Act of 1980. It is reflected as well

in post-Protocol efforts to draft a broader convention on territorial asylum, which proceeded from the premise that the prohibition in Article 33 applies only to aliens within the territory of the Contracting State. See App. 30a; Gov't C.A. Br. 46-50. Accordingly, there is no basis for the court of appeals' unseemly attempts to dismiss as a mere "litigating posture" (App. 31a, 32a) the interpretation of Article 33 formally adopted by the President on behalf of the United States as party to the Convention and as a member of the international community.[16]

4. In nevertheless holding that Section 1253(h) has a worldwide scope, the court of appeals found it significant that the pre-1980 version contained only the word "deport" and referred to any alien "within the United States" (see 8 U.S.C. 1253(h) (1976)), and that Congress added the word "return" and deleted the latter phrase when it amended Section 1253(h) in 1980. App. 15a, 19a, 20a. There are, however, two far more persuasive explanations for what Congress did.

First, this Court has already held that the 1980 revisions to Section 1253(h) were clarifying amendments designed to conform its language to that of Article 33. *Stevic*, 467 U.S. at 421; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987). That result was accomplished by inserting "or return" and deleting "within the United

[16] The court of appeals relied on a 1981 opinion of the Office of Legal Counsel in which OLC concluded that the proposed interdiction of Haitian flag vessels would not violate the Convention and observed that "[i]ndividuals who claim that they will be persecuted * * * must be given an opportunity to substantiate their claims." 5 Op. Off. Legal Counsel 242, 248 (1981); see App. 31a. The latter observation was not accompanied by an analysis of the Convention's text or negotiating history or the understanding of the Convention's scope upon ratification. In 1985 the Department of Justice, in *HRC* v. *Gracey*, *supra*, took the position that the Convention does not apply outside the United States. Furthermore, in an opinion dated December 12, 1991, OLC concurred in the conclusion of the Department of State's Legal Adviser and expressly reversed the conclusory statement in the 1981 opinion relied upon by the court below. App. 31a.

States," since Article 33 also contains "or return" but nothing parallel to "within the United States."

Second, prior to the 1980 amendments, this Court had held in *Leng May Ma* that the benefits of Section 1253(h) were not available to "excludable" aliens who were apprehended at the border and paroled into the United States. That holding rested on the Court's conclusion that such aliens were not among those "within the United States," as that phrase was used in Section 1253(h). 357 U.S. at 190. As a result, if Congress wanted to extend the benefits of 1253(h) to such aliens in 1980, one way to accomplish that result was to delete the phrase "within the United States." As Judge Walker pointed out, there is support in the legislative history for the propostion that the 1980 revisions were intended to do just that. See App. 58a (quoting H.R. Rep. No. 608, *supra*, at 30) (changes were made to "require * * * the Attorney General to withold deportation of aliens who qualify as refugees and [who are in exclusion as well as deportation proceedings]"). And as Judge Walker also pointed out, App. 59a, the addition of "return" may serve to clarify that intent, because "deport," as used in Part V of the INA, does not technically encompass removal of excludable aliens, *Leng May Ma*, 357 U.S. at 187, while "return" does. See also *HRC* v. *Gracey*, 809 F.2d at 840 (Edwards, J., concurring and dissenting) (similarly concluding that Section 1253(h), as amended, applies in exclusion proceedings).

Either of the foregoing explanations for the 1980 revisions is plausible. By contrast, the court of appeals' interpretation is wholly implausible, for it ascribes to Congress the intent to use a two-word phrase buried in the body of Section 1253(h)—"or return"—to confer a free-standing right of non-repatriation on aliens throughout the world. Any inference of such an intent is refuted both by the text of the 1980 amendments themselves, which added the language in subparagraph 2(C) of Section 1253(h) that presupposes the alien's "arrival * * * in

the United States," and by the legislative history of the amendments, which shows that Congress understood the Convention (and therefore the conforming changes in Section 1253(h)) to apply only to "refugees within the territory of the contracting states." H.R. Rep. No. 608, *supra*, at 17.

D. We have explained in Point A, *supra*, that respondents' judicial assault on the conduct of the interdiction program is precluded by the INA, which furnishes a right of judicial review only to aliens within the United States. But even if review is not statutorily foreclosed, the APA does not excuse courts from their duty "to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). That provision was enacted in 1976, in response to recommendations by the Administrative Conference (H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976)), to ensure that the APA's waiver of sovereign immunity does not allow courts to "decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action." See *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of Administrative Conference Committee on Judicial Review). The court of appeals' refusal to dismiss this suit in equity, and its decision instead to order injunctive relief, transgress this fundamental limitation.

Since the President issued the new Executive Order on May 24, outmigration from Haiti has largely dissipated. The injunctive relief ordered by the court of appeals, if allowed to stand, will recharge the now-dormant migrant crisis, with all its attendant problems: loss of life; interference with the conduct of foreign policy, the operation of military vessels on the high seas, and the use of a U.S. military base on hostile foreign soil in Cuba; and diversion of the limited resources of the State

Department, Navy, Coast Guard, and INS from the tasks to which they have been assigned by the President and Congress. It will also impede the flexibility the President requires to address the migrant problem within the broader context of the sensitive and fluid situation affecting Haiti generally, which is the subject of ongoing diplomatic and economic measures. And it will undermine the ability of this Nation to speak with one voice, through the President, regarding the scope of the United States' obligations under Article 33 of the Convention, which the court of appeals, in the course of its opinion, has unilaterally extended to the high seas and throughout the world. Especially in the absence of an Act of Congress that purports to extend the equitable powers of federal courts into this sensitive area with far greater specificity than the general judicial review provisions of the APA, "[t]he separation of powers problems present here make this virtually a textbook case for refusing such discretionary relief." *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985); see also *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985).[17]

[17] The injunctive relief restraining the operations of U.S. military vessels on the high seas is all the more inappropriate because it was sought by and granted to aliens who not only are outside the United States, but are nationals and residents of the foreign nation that is the very subject of the President's actions. The President, to whom the Constitution and Acts of Congress assign primary responsibility in this area, has assessed the overall situation and determined that the interests of the Haitian nationals concerned and other interests at stake are properly served by the policy he instituted on May 24: direct repatriation to Haiti, albeit with (i) an exception for interdictees who are threatened with immediate and grave physical danger (see note 5, *supra*), and (ii) provisions for the orderly processing of requests by Haitian nationals for admission to the United States as refugees under 8 U.S.C. 1157, which Congress enacted in 1980 specifically to govern the admission of refugees from outside the United States. It is not the role of a U.S.

For the same reasons—and in light of the acknowledged conflict with the Eleventh Circuit's decision in *HRC*—the Court should grant review of the court of appeals' extraordinary decision enjoining a central feature of the interdiction program established by the President.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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court to second-guess the adequacy of this admissions mechanism fashioned by Congress and the President, or to "balance" the interests of aliens abroad in circumventing that mechanism against other interests the court might deem relevant.

More than 9000 Haitian nationals have availed themselves of the opportunity to file an application under Section 1157 at the U.S. Embassy in Haiti. Although many residents of Haiti might choose to set out for the United States without prior approval under that Section, nothing in the record supports the notion that there is a threat of persecution to members of the respondent class of such pervasiveness and magnitude that it would render that avenue of relief meaningless or justify the sweeping injunctive relief ordered by the court of appeals—even if we assume, *arguendo*, that the courts below could properly weigh the competing equities in this setting.

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